

DISTRICT OF MAINE

Defendant

Civil No. 01-12-P-H

Defendant Macy’s East, Inc. (“Macy’s”) moves for summary judgment as to the entirety of plaintiff and former employee Lynda C. Rutledge’s amended complaint. Defendant’s Motion for Summary Judgment (“Defendant’s Motion”) (Docket No. 11); Amended Complaint (“Complaint”) (Docket No. 8). Ancillary thereto, Rutledge requests an opportunity to supplement the record pursuant to Fed. R. Civ. P. 56(f), *see* Plaintiff’s Objection to Defendant’s Motion for Summary Judgment, etc. (“Plaintiff’s Opposition”) (Docket No. 18) at 4, 11-12, and Macy’s seeks to preclude Rutledge from relying on either diary entries or a narrative appended to her Maine Human Rights Commission (“MHRC”) charge to support her opposing statement of material facts, *see* Defendant’s Statement of Facts in Reply to Plaintiff’s Statement of Facts (“Defendant’s Reply SMF”) (Docket No. 21) at 1 n.2, 2 n.3. For the reasons that follow, I grant in part and deny in part the parties’ ancillary requests (which I treat as motions, although not styled as such) and recommend that the Defendant’s Motion be granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

A. Ancillary Motions

I address at the outset the parties’ ancillary motions, which partly define the boundaries of facts cognizable on summary judgment. In Rutledge’s memorandum opposing summary judgment (filed

on July 10, 2001) she sought leave pursuant to Fed. R. Civ. P. 56(f) to supplement her opposition by July 24th on the basis that the taking of three depositions was rescheduled per agreement of the parties to July 16th and 17th. Plaintiff's Opposition at 11-12. On July 24th Rutledge filed a supplemental brief and statement of material facts, and Macy's responded in due course to both. *See* Plaintiff's Supplemental Statement of Material Facts ("Plaintiff's Supp. SMF") (Docket No. 22); Plaintiff's Supplemental Objection to Defendant's Motion for Summary Judgment, etc. (Docket No. 23); Defendant's Response to Plaintiff's Supplemental Objection (Docket No. 25) ("Defendant's Rule 56(f) Opposition"); Defendant's Statement of Facts in Response to Plaintiff's Supplemental Statement of Facts (Docket No. 26).

Macy's contends, and I agree, that Rutledge falls short of demonstrating entitlement to "savor the balm of Rule 56(f)." *See* Defendant's Rule 56(f) Opposition at 1-2; Defendant's Reply Memorandum of Law in Support of Its Motion for Summary Judgment ("Defendant's Reply") (Docket No. 20) at 6; *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 44 (1st Cir. 1998). Rule 56(f) provides in its entirety:

Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A party seeking this relief must (i) "act in a timely fashion," (ii) submit moving papers "contain[ing] a proffer which, at a bare minimum, articulates a plausible basis for the movant's belief that previously undisclosed or undocumented facts exist, that those facts can be secured by further discovery, and that, if obtained, there is some credible prospect that the new evidence will create a trialworthy issue" and (iii) "set forth good cause to explain [its] failure to have conducted the desired discovery at an earlier date." *American Bar Ass'n*, 142 F.3d at 44. Moreover, the rule contemplates that the "proffer" be

submitted in the form of an affidavit. *Butcher Co. v. Bouthot*, 124 F. Supp.2d 750, 753 (D. Me.), *recon. denied*, 2001 WL 263313 (D. Me. 2001).

Rutledge's proffer is deficient not only in form (encapsulated solely in a legal brief) but also in substance (articulating no basis for believing the depositions in issue would set forth previously undocumented facts or otherwise generate a trialworthy issue). *See* Plaintiff's Opposition at 11-12; *Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985, 989 (1st Cir. 1988) (mere conclusory assertion that "additional facts need[ed] to be established through discovery," standing alone, "entirely inadequate to extract the balm of Rule 56(f)") (internal quotation marks omitted).

Further, Rutledge fails to demonstrate the diligent pursuit of discovery. On June 6, 2001 Macy's filed a "consented-to motion" to extend discovery (scheduled to close on June 12th) for two weeks, representing *inter alia*: "Plaintiff, for her part, has completed no depositions in the case and only just served deposition notices upon defendant for one current employee of Macy's and two former employees. . . . Defendant's counsel is not available for deposition on [the noticed day] and does not believe plaintiff's counsel has even subpoenaed the two non-party witnesses for deposition that day." Consented to Motion To Extend Discovery for Two Weeks (Docket No. 10) at 1-2. In denying this motion on the showing made, I noted: "It is not apparent that diligent efforts were made to schedule and complete discovery prior to 6/12/01 or, if such efforts were made, what they consisted of and why, despite them, it is not possible to complete discovery by 6/12/01." Endorsement to *id.* The existence of diligent efforts is no more apparent now, on the showing made by Rutledge, than it was then. "Although a district court should generally apply Rule 56(f) liberally, the court need not employ the rule to spare litigants from their own lack of diligence." *Paterson-Leitch*, 840 F.2d at 989

(citation and internal quotation marks omitted). Rutledge's Rule 56(f) motion accordingly is denied.

I turn next to Macy's request to preclude Rutledge from relying on either diary entries or a narrative appended to her MHRC charge. *See* Defendant's Reply SMF at 1 n.2, 2 n.3. Rutledge's diary entries are neither signed nor sworn. *See* diary entries ("Diary"), attached as Exh. D-10 to Deposition of Lynda C. Rutledge ("Rutledge Dep."), filed with Defendant's Motion. Nor were the entries made contemporaneously, a circumstance under which they might have been admissible pursuant to the "present sense impression" exception to the hearsay rule. *See* Rutledge Dep. at 49 ("I didn't always go home and try to document everything as it happened on that day. You know, I had to sit back and think about it, I remember, and make sure that this is what – this is what's happened."), 51-52 (Rutledge would transfer information from papers on which she initially jotted it down to diary); Fed. R. Evid. 803(1) (hearsay rule does not exclude "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"); *United States v. Santos*, 201 F.3d 953, 964 (7th Cir. 2000) ("Only when the statement is made in circumstances, not present here, in which the declarant had little chance to revise his initial reaction is it admissible" as a present-sense impression). For these reasons, I rule that Rutledge may not buttress her statement of opposing facts with her diary entries.

The MHRC narrative, on the other hand, is incorporated by reference in a document that Rutledge declared under penalty of perjury was "true and correct." Charge of Discrimination ("MHRC Charge"), attached as Exh. D-8 to Rutledge Dep. Its contents therefore are admissible.

B. Facts Cognizable on Summary Judgment

With the foregoing peripheral issues resolved, the parties' statements of material facts, credited to the extent either admitted (in some instances only expressly for purposes of summary

judgment) or supported by record citations in accordance with Loc. R. 56, reveal the following relevant to this recommended decision:

In or about October 1994 Rutledge began working as a sales associate for Jordan Marsh. Defendant's Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment ("Defendant's SMF") (Docket No. 12) ¶ 1; Plaintiff's Statement of Material Facts ("Plaintiff's Opposing SMF") (Docket No. 19) ¶ 1.¹ Rutledge was hired by Karen Howes, who became her immediate supervisor. *Id.* At the time she was hired, Rutledge received an employee handbook containing Jordan Marsh's anti-discrimination/anti-harassment policy. Defendant's SMF ¶ 3; Rutledge Dep. at 9, 11-13. She also was informed during her orientation that Jordan Marsh had such a policy. Defendant's SMF ¶ 3; Rutledge Dep. at 11-13. She knew and understood that if she felt she were the victim of discrimination or harassment she was to report it at once to her department head manager. Defendant's SMF ¶ 5; Rutledge Dep. at 14.

Rutledge claims that on December 10, 1994 she overheard a conversation between one of her co-workers in the Better Sportswear Department, Lillian Russell, and Russell's husband during which comments were made that "had something to do with niggers" and "something in the way of Black people getting it." Defendant's SMF ¶ 6; Plaintiff's Opposing SMF ¶ 6. According to Rutledge, Russell's husband said, "Don't worry, she'll get hers," to which Russell responded: "God damn niggers [sic], all of them no good." Plaintiff's Opposing SMF ¶ 6; Rutledge Dep. at 89-91.

At some point the following week (the week of December 18, 1994) Rutledge reported this incident to Howes via a letter that she allegedly gave her. Defendant's SMF ¶ 7; Plaintiff's Opposing SMF ¶ 7. During her deposition Rutledge was not able to recall exactly what she told Howes about this incident. Defendant's SMF ¶ 7; Rutledge Dep. at 92-93. She did recall that upon learning that

¹ Rutledge formerly was known (and sometimes is referred to in the record materials) as Lynda C. McKenna. See Complaint ¶ 1. (continued on next page)

Rutledge was claiming Russell was involved in making racial slurs, Howes remarked, “What? She’s a sweet lady – not Lillian.” Defendant’s SMF ¶ 7; Plaintiff’s Opposing SMF ¶ 7. She also testified that when she handed Howes the letter, Howes read it “and stuffed it in the bottom drawer” of her desk. Plaintiff’s Opposing SMF ¶ 8; Rutledge Dep. at 93.²

During her deposition Rutledge was asked about allegations in paragraph 4 of her complaint regarding harassment prior to Thanksgiving 1994. Defendant’s SMF ¶ 7 n.2; Plaintiff’s Opposing SMF ¶ 7. At that time, she testified to several other allegedly racial incidents involving Russell that had occurred prior to the December 10, 1994 incident. *Id.* However, she acknowledged that she did not report these incidents to Howes. *Id.*

During the week of December 18, 1994 or the following week at the latest, Howes spoke with Russell in an effort to investigate Rutledge’s allegation. Defendant’s SMF ¶ 8; Declaration [of Karen Howes] in Support of Defendant’s Motion for Summary Judgment (“Howes Decl.”) (Docket No. 16) ¶ 4. Russell denied making any racial slurs toward or about Rutledge or harboring any racist attitudes toward her. *Id.* Howes sought and received Russell’s cooperation in working with Rutledge in a productive and professional manner. *Id.*³

Howes then reported back to Rutledge that Russell had denied making any racial slurs or harboring any racist attitudes, and sought and obtained Rutledge’s agreement to make efforts to work with Russell in a productive and professional manner. Defendant’s SMF ¶ 9; Howes Decl. ¶ 4. Although she cannot pinpoint with certainty when it occurred, Rutledge does acknowledge that Howes

Macy’s is the successor to merger of Jordan Marsh. Defendant’s Answer to Plaintiff’s Amended Complaint (Docket No. 9) ¶ 2.

² Rutledge’s assertion that the letter “never was seen again, including when Ms. Rutledge requested and received her personnel file and when she met with Ms. Howe’s superiors,” Plaintiff’s Opposing SMF/Additional Facts ¶ 3, is neither admitted nor supported by the citation given. Rutledge’s separately numbered section of additional facts begins on page 5 of her opposing statement of material facts.

³ Although Rutledge denies that Howes spoke with Russell within a week of receiving Rutledge’s complaint, *see* Plaintiff’s Opposing SMF ¶ 8, her statements that Howes placed Rutledge’s letter in a bottom desk drawer upon receipt and that Howes did not contemporaneously document her alleged investigative efforts do not effectively controvert that point. In addition, Rutledge admitted at deposition that she was not present for any such conversation and had no basis to dispute that it occurred. Defendant’s Reply SMF ¶ (continued on next page)

did report to her that she had spoken with Russell about Rutledge's allegations against her. Defendant's SMF ¶ 9; Rutledge Dep. at 109. Rutledge testified, however, that she believed the conversation with Howes about her allegedly speaking to Russell was "months" later, near the end of her employment with Jordan Marsh. Plaintiff's Opposing SMF ¶ 9; Rutledge Dep. at 109. No such conversation had taken place as of the date of the filing of Rutledge's complaint with the MHRC on June 5, 1995. Plaintiff's Opposing SMF ¶ 9; MHRC Charge at [3].

Howes followed up with both Rutledge and Russell in late December 1994/early January 1995 to monitor their progress, and both reported to her orally that they were working well together. Defendant's SMF ¶ 10; Howes Decl. ¶ 5.⁴ Rutledge thanked Howes for her "support" in a January 8, 1995 written response to her performance review. *Id.* However, Rutledge denies that she told Howes she was satisfied with Howes' handling of her complaints. Plaintiff's Opposing SMF ¶ 10; Rutledge Dep. at 112-13, 123, 162-63. In Rutledge's view Howes had "swept it under the rug." Plaintiff's Opposing SMF/Additional Facts ¶ 4; Rutledge Dep. at 123.⁵

On January 7, 1995 Rutledge met with Howes to discuss her performance. Defendant's SMF ¶ 11; Rutledge Dep. at 101. While Rutledge does remember mentioning Russell during this review, she was unable to recall all of the specifics of the discussion. Defendant's SMF ¶ 11; Rutledge Dep. at 101-02. The only specific thing she could recollect telling Howes during this meeting was about the December 10, 1994 incident involving Russell and her husband, and about it being hard to work under those conditions. Defendant's SMF ¶ 11; Rutledge Dep. at 105. Rutledge's only reason for mentioning this incident during the January meeting was "[b]ecause [Howes] had never sat down with

8; Rutledge Dep. at 113.

⁴ Although Rutledge denies this statement, *see* Plaintiff's Opposing SMF ¶ 10, she does not effectively controvert it. For example, the fact that Howes may not have informed Rutledge until as late as June 1995 that she spoke with Russell regarding Rutledge's race-discrimination charge, *see id.* ¶¶ 9-10, is not inconsistent with Macy's assertion that Howes spoke with both Rutledge and Russell individually regarding their working relationship in late December 1994 or early January 1995.

[her] or because it was never brought up again.” Defendant’s Reply SMF ¶ 11; Rutledge Dep. at 105.

At no point during the January 7, 1995 meeting did Rutledge raise any new allegations regarding Russell. Defendant’s SMF ¶ 11; Howes Decl. ¶ 5 n.1.

During her deposition, Rutledge testified that an additional racial incident involving Russell (mentioned in paragraph 5(b) of her complaint) occurred on December 29, 1994; however, she acknowledged that she did not specifically report this incident to Howes. Defendant’s SMF ¶ 11 n.3; Rutledge Dep. at 105-07; Complaint ¶ 5(b). Rutledge also testified about an allegedly racial incident that occurred on January 7, 1995 (mentioned in paragraph 5(c) of her complaint) but was unable to testify that she had ever reported this incident to Howes, either. Defendant’s SMF ¶ 11 n.3; Rutledge Dep. at 115-20; Complaint ¶ 5(c). In addition, Rutledge testified that on January 6, 1995 an incident occurred involving Russell and a customer. Defendant’s SMF ¶ 11 n.3; Rutledge Dep. at 131. According to Rutledge, she “brief[ed]” Howes on this incident but did not think she “went into it specifically.” Defendant’s SMF ¶ 11 n.3; Rutledge Dep. at 132.

During her deposition, Rutledge testified to the following allegedly racial incidents (mentioned in paragraph 5(d) of her complaint) that had occurred during the months of January and February 1995: a January 31, 1995 incident in which Denise Fogg made a derogatory comment about Rutledge’s hair and two February 17, 1995 incidents in which Rita Fitzpatrick commented about whites being superior and mocked Rutledge’s walk. Defendant’s SMF ¶ 12 n.4; Rutledge Dep. at 135-41; Complaint ¶ 5(d). Rutledge could not recall whether she had ever complained to Howes or anyone else within Jordan Marsh management about these incidents. Defendant’s SMF ¶ 12 n.4; Rutledge Dep. at 136, 141-42.

The only other time that Rutledge discussed her allegations of racial harassment with Howes was on March 10, 1995. Defendant’s SMF ¶ 12; Rutledge Dep. at 122-24; Howes Decl. ¶ 5. Howes

⁵ Rutledge’s further assertion that the defendant “never took any remedial action,” Plaintiff’s Opposing SMF/Additional Facts ¶ 4, is (continued on next page)

had met with Rutledge on two prior occasions during the month of February 1995, and Rutledge had refused to admit to any problems with her job or open up to Howes regarding any issues. Defendant's SMF ¶ 12; Howes Decl. ¶ 6.⁶ In the March 10th meeting Howes at first attempted to deny that she had been told about the incident with Russell and then, when Rutledge referred to the letter she had given Howes on December 18th, said she remembered and still had the letter. Plaintiff's Opposing SMF ¶ 12; Rutledge Dep. at 121-22.

During the meeting Rutledge made allegations regarding racial slurs and gestures by other sales associates and their spouses. Defendant's SMF ¶ 13; Howes Decl. ¶ 6. While Rutledge did mention the names of some sales associates who she claimed were involved in racial harassment, she did not provide Howes with any specific information concerning exactly what took place, when it took place and who was involved. *Id.* As Rutledge has described it, the conversation was "just brief, general." Defendant's SMF ¶ 13; Rutledge Dep. at 149.⁷ During this conversation Rutledge also made allegations about various other incidents with which she was unhappy, *e.g.*, someone opening her purse. Defendant's SMF ¶ 13; Howes Decl. ¶ 6.⁸ However, she did not know who was responsible for this conduct. *Id.*

During this meeting Howes suggested to Rutledge that they take her allegations to a higher authority, Paul Lausier, the director of administration, and Howes scheduled a meeting to be held the next day with Lausier. Defendant's SMF ¶ 14; Plaintiff's Opposing SMF ¶ 14. Howes and Rutledge

neither admitted nor supported by the citation given.

⁶ Rutledge asserts that she "referred to the racial harassment she was suffering in each meeting with Karen Howes" and that she mentioned it again on March 10th "because of her anger and continuing frustration that nothing had been done." Plaintiff's Opposing SMF ¶ 12. However, these statements are neither admitted nor supported by the citation given.

⁷ Rutledge's statement that she "did tell Ms. Howes about these incidents," Plaintiff's Opposing SMF ¶ 13, is not inconsistent with, and does not controvert, the description of Rutledge's report given by Macy's.

⁸ Although Macy's characterizes these other incidents as "non-racial," *see* Defendant's SMF ¶ 13; Howes Decl. ¶ 6, I agree with Rutledge that this is an argumentative gloss, *see* Plaintiff's Opposing SMF ¶ 13, and therefore disregard it.

also discussed the possibility of Rutledge transferring departments. *Id.* According to Rutledge, Howes brought up the possibility of transferring her to Lamps, an option Rutledge rejected. *Id.*

On or about March 11, 1995 Lausier met with Rutledge in his office to discuss the allegations of racial harassment she had raised with Howes the previous day. Defendant's SMF ¶ 15; Declaration [of Paul Lausier] in Support of Defendant's Motion for Summary Judgment ("Lausier Decl.") (Docket No. 14) ¶ 3. During the meeting Rutledge made general allegations about being subjected to racial harassment by certain sales associates with whom she worked at the Jordan Marsh store. *Id.* However, she refused to provide Lausier with any specific information or details about the harassment of which she complained, *i.e.*, dates, words spoken and/or conduct observed and any witnesses thereto. *Id.* As Rutledge described the conversation, "[I]t wasn't specific, you know, detail. It wasn't, you know – but it was just overall[.]" Defendant's SMF ¶ 15; Rutledge Dep. at 153-54. Lausier had not received a copy of the letter given to Howes earlier. Plaintiff's Opposing SMF ¶ 15; Rutledge Dep. at 153.

During the meeting Rutledge also told Lausier that certain other incidents had occurred about which she was also complaining, *e.g.*, that money was stolen from her purse; that she received harassing phone calls at home from an unknown caller; that her car was scratched; and that a completed charge-card application was taken. Defendant's SMF ¶ 16; Lausier Decl. ¶ 3.⁹ She again refused to provide Lausier with the details of these incidents. *Id.* Lausier indicated to Rutledge that in order to investigate and address her allegations he needed specific information. Defendant's SMF ¶ 17; Lausier Decl. ¶ 3. As Rutledge described it, she "talked around the question as much as [she] could." Defendant's SMF ¶ 17; Rutledge Dep. at 156. However, she did agree to meet with Lausier

⁹ For the reasons discussed above, I again rebuff Macy's attempt to characterize certain incidents, as a factual matter, as "non-racial." *See* Defendant's SMF ¶ 16; Lausier Decl. ¶ 3.

again on March 14, 1995 to discuss her allegations further. Defendant's SMF ¶ 17; Lausier Decl. ¶ 3.¹⁰

On March 14, 1995 Rutledge and Lausier again met in his office. Defendant's SMF ¶ 18; Lausier Decl. ¶ 5. During that meeting Lausier reiterated his need for specific information, and Rutledge informed him that she was not willing to provide it. *Id.* She also informed him that she had contacted an attorney and that her attorney would contact him. *Id.* Lausier advised Rutledge that he would be notifying Sandra Hores, the store manager, of Rutledge's concerns. *Id.* Lausier did so. Defendant's SMF ¶ 19; Plaintiff's Opposing SMF ¶ 19. Rutledge and Hores met shortly thereafter. *Id.* During that meeting Rutledge made general allegations about being subjected to racial harassment by Russell and Russell's husband. *Id.* She stated generally that she felt other sales associates were hostile to her and essentially were "out to get her." *Id.*

As Rutledge remembers the meeting with Hores, she "briefed" Hores and said, "[T]his is what's been going on, this is what happened." *Id.*¹¹ Rutledge also indicated to Hores that certain other incidents occurred about which she was also complaining, *e.g.*, that money was stolen from her purse; that she received harassing phone calls at home from an unknown caller; that her car was scratched; that her charge-card application was taken; and that she felt Howes had been spying on her. *Id.*¹²

Hores and Rutledge also discussed the issue of a transfer, with Rutledge informing Hores that she had talked to Howes about transferring to either Lamps or Domestics. Defendant's SMF ¶ 20; Rutledge Dep. at 163-65. Rutledge had asked Howes about transferring to Domestics and

¹⁰ Rutledge's assertion that she "did provide sufficient information about the incidents to Mr. Lausier, Ms. Howes, and, later, Ms. Hores, the store manager, to require some remedial action," Plaintiff's Opposing SMF ¶ 17, is essentially legal argumentation that is neither admitted nor supported by the record citations given.

¹¹ Rutledge's contentions that she "went up the chain of command with her complaints," and that she reviewed with Hores "in detail the incidents of harassment she had experienced over several months and had reported to Ms. Howes and Mr. Lausier," Plaintiff's (continued on next page)

remembered that Howes did not shut down the discussion about such a transfer or give her a definitive response. Defendant's SMF ¶ 21; Plaintiff's Opposing SMF ¶ 21. However, Rutledge had not initiated discussions regarding a transfer and felt that Howes had floated this idea to get rid of her. Plaintiff's Opposing SMF ¶ 20; Rutledge Dep. at 146-47, 162-63. During her meeting with Hores, Rutledge told Hores she liked Better Sportswear and would like to stay there. Defendant's SMF ¶ 22; Plaintiff's Opposing SMF ¶ 22.

After the meeting with Rutledge Hores did follow up with Howes and Lausier on Rutledge's allegations. Defendant's SMF ¶ 23; Declaration [of Sandra Hores] in Support of Defendant's Motion for Summary Judgment ("Hores Decl.") (Docket No. 13) ¶ 4.¹³ Howes indicated that she had previously followed up with Russell on Rutledge's allegations. *Id.* After her meeting with Rutledge, Hores did not hear of any further allegations of racial harassment of Rutledge from Rutledge, Howes or Lausier. Defendant's SMF ¶ 24; Hores Decl. ¶ 4.¹⁴

Apart from Rutledge's own complaints concerning racial harassment, an employee named Kathy Scammon reported to Howes that Russell had commented that she did not see Rutledge "with that black sweater on." Defendant's Reply SMF/Response to Plaintiff's Additional Facts ¶ 1¹⁵; Respondent's Position Statement and Response to Document Request, *McKenna v. Jordan Marsh*

Opposing SMF/Additional Facts ¶ 5, are neither admitted nor supported by the record citation given.

¹² For the reasons discussed above, I disregard Macy's characterization of these additional incidents as "non-racial."

¹³ Rutledge's denial that the followup "was reasonable or adequate to investigate or remedy Plaintiff's complaints," and her further allegation that "[t]he hostile atmosphere continued and ultimately forced Ms. Rutledge's resignation," Plaintiff's Opposing SMF ¶ 23, are neither admitted nor supported by the record materials cited. In addition, Rutledge testified that no further incidents of racial comments or conduct occurred between the date of her meeting with Hores and the date of her resignation letter, June 25, 1995. Defendant's Reply SMF ¶ 23; Rutledge Dep. at 168. She stated, "[B]y this time everybody knew, and it had ceased." Defendant's Reply SMF ¶ 23; Rutledge Dep. at 167. She also made clear during her deposition that the "racial tension" referred to in her resignation letter was based upon incidents that had occurred prior to her meeting with Hores, Defendant's Reply SMF ¶ 23; Rutledge Dep. at 169, although the tension lingered even after the incidents had ceased, Plaintiff's Opposing SMF ¶ 25; Rutledge Dep. at 169.

¹⁴ Rutledge's assertion that her "resignation letter made it clear that she was resigning due to these incidents," Plaintiff's Opposing SMF ¶ 24, does not controvert the point that Hores heard of no further incidents of racial harassment.

¹⁵ Macy's separately numbered response to Rutledge's additional facts begins on page 4 of its reply statement of material facts.

Stores Corp., MHRC No. E95-0355, attached to Plaintiff's Opposition, ¶ 2.¹⁶ Howes asked Rutledge for more information about this incident, and Rutledge refused to provide it. *Id.* Nevertheless, Howes did discuss the matter with Russell, who denied the incident. *Id.*

On June 5, 1995 Rutledge filed a charge of discrimination with the MHRC. Defendant's SMF ¶ 26; Plaintiff's Opposing SMF ¶ 26. She resigned from her employment at Jordan Marsh by letter dated June 23, 1995. Defendant's SMF ¶ 2; Plaintiff's Opposing SMF ¶ 2.¹⁷ She did so due to the persistent atmosphere of racial tension. Plaintiff's Opposing SMF/Additional Facts ¶ 6; Rutledge Dep. at 167-69; Letter dated June 23, 1995 from Lynda McKenna to Ms. Hores, attached as Exh. D-12 to Rutledge Dep.¹⁸

III. Analysis

Rutledge presses a single claim of race discrimination in violation of 42 U.S.C. § 1981, for which she seeks compensatory and punitive damages as well as interest, attorney fees and costs. *See* Complaint ¶¶ 8-10. Section 1981 secures to "[a]ll persons within the jurisdiction of the United States . . . the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens" 42 U.S.C. § 1981(a).¹⁹ This right is "protected against impairment by nongovernmental discrimination" as well as "impairment under color of State law." *Id.* § 1981(c).

As Macy's concedes, section 1981 provides a cause of action for race-based employment discrimination based on a hostile work environment, borrowing the analytical framework employed

¹⁶ Macy's denies that Scammon ever made such a report to Howes. Defendant's Reply SMF/Response to Plaintiff's Additional Facts ¶ 1; Deposition of Karen Howes, filed with Plaintiff's Supp. SMF, at 27.

¹⁷ I disregard Rutledge's blanket assertions that she "experienced numerous acts of racial harassment, threats and intimidation while employed with Defendant" and that she "informed her supervisor Karen Howes of these incidents, and no action was taken that had any effect on the negative racial atmosphere," Plaintiff's Opposing SMF/Additional Facts ¶ 2, inasmuch as they are conclusory and the MHRC Charge does not in any event fairly support these broad propositions.

¹⁸ Rutledge's further statement that the racial tension "continued despite her numerous efforts to obtain remedial action by Defendant," Plaintiff's Opposing SMF/Additional Facts ¶ 6, is neither admitted nor supported by the citations given.

¹⁹ "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

when such claims are brought pursuant to Title VII of the Civil Rights Act of 1964, as amended. *See* Memorandum of Law in Support of Defendant’s Motion for Summary Judgment (“Defendant’s Memorandum”) (Docket No. 11) at 3-4; *see also Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 13 (1st Cir. 1999) (“[H]ostile work environment claims may now be pursued by employees under both Title VII and section 1981.”); *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 18-19 (1st Cir. 1999) (“The appellant’s principal contention is that the lower court too hastily jettisoned his race discrimination claims. Although this contention flies the flags of both 42 U.S.C. § 1981 and Title VII . . . , the subsidiary claims hinge upon identical legal standards.”).

To make out a claim of hostile work environment pursuant to section 1981, a plaintiff must show not only the existence of a contractual relationship – something not here disputed – but also “(1) that the plaintiff was exposed to comments, jokes, or acts of a racial nature by the defendant’s employees; and (2) that the conduct had the purpose or effect of interfering with the plaintiff’s work performance or created an intimidating, hostile or offensive working environment.” *Danco*, 178 F.3d at 16. “While a plaintiff must show more than a few isolated incidents of racial enmity, there is no absolute numerical standard by which to determine whether harassment has created a hostile environment.” *Id.* (citations and internal quotation marks omitted). Instead,

whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.

Id. (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

The mere existence of a hostile work environment is not dispositive of employer liability. “[T]he defendant will ordinarily only be liable for harassment by low-level employees if management-level employees knew or should have known about it.” *Id.* Moreover, an employer in

such a situation must have “fail[ed] to take appropriately remedial action.” *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 72 (2d Cir. 2000) (citation and internal quotation marks omitted); *see also O’Rourke v. City of Providence*, 235 F.3d 713, 736 (1st Cir. 2001) (finding no error in jury instruction, “If it is her coworker, or coworkers, who are guilty of this harassing conduct, then the city is only liable if a superior officer knew, or should have known, of the harassment and failed to take prompt remedial action.”). An “employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and correcting . . . harassing conduct.” *Whidbee*, 223 F.3d at 72 (citation and internal quotation marks omitted).

Macy’s moves for summary judgment as to Rutledge’s section 1981 claim on two alternative bases: (i) that Rutledge has failed to demonstrate the existence of a race-based hostile work environment and (ii) that, in any event, to the extent it knew about Rutledge’s allegations it took appropriate remedial action. Defendant’s Memorandum at 3-10. If denied relief on the underlying claim it seeks summary judgment as to Rutledge’s claim for punitive damages. *Id.* at 10-12. I find that, although Rutledge adequately demonstrates the existence of a hostile work environment, she fails to raise a triable issue whether Macy’s took appropriate remedial action. This obviates the need to consider the punitive-damages question in this case.

Macy’s first contends that the racial incidents Rutledge reported to management, viewed in isolation, did not amount to a hostile work environment. *See id.* at 6-7. In so doing it constructs an argument on a faulty premise. The standard at this stage of analysis is whether the totality of the alleged conduct – not merely the subset reported to an employer – created a hostile work environment. *See, e.g., Harris*, 510 U.S. at 23 (“[W]e can say that whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.”). Viewing the record through this broader lens, a jury reasonably could conclude that Rutledge was subjected in her short tenure at

Jordan Marsh to a hostile work environment stemming from racial animus. The “totality of circumstances” included not only racially derogatory and highly offensive remarks and jokes (*i.e.*, Russell’s “nigger” and “black sweater” comments, Fogg’s derogatory remark about Rutledge’s hair and Fitzpatrick’s mockery of Rutledge’s walk and observation that whites were superior) but also suspicious incidents, such as the scratching of Rutledge’s car and the opening of her purse, that a jury reasonably could infer stemmed from racial animus. *See Jackson v. Quanex Corp.*, 191 F.3d 647, 662 (6th Cir. 1999) (“[E]ven though a certain action may not have been specifically racial in nature, it may contribute to the plaintiff’s proof of a hostile work environment if it would not have occurred but for the fact that the plaintiff was African American. Indeed, a showing of the use of racial epithets in a work environment may create an inference that racial animus motivated other conduct as well.”) (citations and internal quotation marks omitted); *see also Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 614 (1st Cir. 2000) (“Alleged conduct that is not explicitly racial in nature may, in appropriate circumstances, be considered along with more overtly discriminatory conduct in assessing a Title VII harassment claim.”).²⁰

Although Rutledge makes out a sufficient showing of the existence of a hostile work environment to withstand summary judgment, her case founders on the employer-liability prong. In her statement of material facts, Rutledge attempts to deny that, following her December 1994 complaint, Howes (i) promptly spoke with Russell, (ii) sought and received Russell’s cooperation in working with Rutledge in a productive and professional manner, and (iii) followed up with both Rutledge and Russell in late December 1994/early January 1995 to monitor their progress, at which time both

²⁰ Macy’s denies that Russell’s “black sweater” comment was “racial,” arguing that it was “patently ambiguous.” Defendant’s Reply Memorandum of Law in Support of Its Motion for Summary Judgment (“Defendant’s Reply”) (Docket No. 20) at 3 n.3. No one seriously could contend that this comment served a useful purpose. A trier of fact reasonably could construe it as a racially hostile remark. Macy’s also attempts to distinguish *Quanex* on the basis that, there, the plaintiff alleged that the same person who had used a racial epithet against her had engaged in certain additional conduct that arguably was motivated by race. Defendant’s Reply at 3-4. (*continued on next page*)

reported orally that they were working well together. However, Rutledge's statements do not effectively controvert these assertions.

Further, although (according to Rutledge) Jordan March employee Kathy Scammon reported to Howes that Russell had commented that she did not see Rutledge "with that black sweater on," there is no cognizable evidence as to when this report was made. From all that appears in the parties' statements of material facts, it could have been made as late as March 1995, simultaneously with Rutledge's own disclosure of the existence of further racial incidents to Howes. In addition, while Rutledge briefed Howes concerning a January 6, 1995 incident involving Russell and a customer, no details of this incident are provided in the parties' statements of material facts; moreover, Rutledge did not think she "went into [the incident] specifically" with Howes.²¹

In short, the cognizable facts paint a portrait from which no reasonable trier of fact could conclude that Jordan Marsh failed to take prompt remedial action based on the information that it knew or should have known. An employer need only exercise reasonable care in preventing and correcting harassing conduct; it need not prove success in doing so. *Whidbee*, 223 F.3d at 72. Howes was confronted with a report of a solitary incident regarding a woman (Russell) who denied the charge and whose denial apparently was (in Howes' view) credible. There is no evidence that any further investigation into that particular incident was possible; *e.g.*, that another co-worker had overheard this exchange. Howes nonetheless took the cautionary step of counseling both Rutledge and

However, with respect to at least one of the incidents – tampering with acid valves – the perpetrator was unknown. *Quanex*, 191 F.3d at 654-55.

²¹ I note that in its reply brief Macy's states that the alleged Scammon notification occurred in December 1994, *see* Defendant's Reply at 2 n.2; however, that fact is contained in none of the parties' statements of material facts. Per Loc. R. 56 and this court's caselaw construing that rule, facts contained only in legal briefs are the equivalent of trees falling in the forest. They do not form a part of the cognizable summary-judgment record. *See, e.g., Shaw v. M.S.A.D. #61*, Civil No. 00-217-P-C, 2001 WL 55404, at *1 n.1 (D. Me. Jan. 22, 2001) ("The strewing of responses to facts throughout the body of a brief contravenes not only the letter but also the spirit of [Loc. R. 56], key purposes of which are to focus the issues and to conserve the time of counsel and the court."). To the extent that the consideration of the timing of Scammon's remark, or the details of Rutledge's report of the January 6, 1995 incident to Howes, might have influenced the outcome hereof, Rutledge had an opportunity to establish those facts via her opposing statement of material (continued on next page)

Russell regarding professionalism and monitoring their interaction. There is no cognizable evidence that, at least through March 1995, Howes was provided indicia (either via the interactions of the two women or reports of racial incidents by Rutledge or anyone else) that more was necessary.²² When Howes finally was provided further detail, she immediately arranged for Rutledge to take her complaints up the chain of command. Even then, Rutledge resisted reporting detail. In any event, as of that time no further racial incidents transpired. Finally, although Howes (per Rutledge's version of events) did not report back to Rutledge concerning the outcome of Howes' investigation into Rutledge's complaint until June 1995, at the earliest, this regrettable delay establishes at most that Howes' communication was poor, not that her underlying remedial actions were themselves deficient.

Macy's accordingly is entitled to summary judgment as to Rutledge's racial-discrimination claim.

IV. Conclusion

For the foregoing reasons, I **DENY** Rutledge's motion pursuant to Fed. R. Civ. P. 56(f) to supplement the record, **GRANT** in part and **DENY** in part Macy's motion to preclude Rutledge from relying on her Diary and EEOC Charge, and recommend that Macy's motion for summary judgment be **GRANTED**.

facts.

²² *Whidbee*, on which Rutledge relies for the proposition that there is a jury question whether Jordan Marsh's response was reasonable, *see* Plaintiff's Opposition at 8-10, is distinguishable. There, after two employees complained that a co-worker (Corliss) had made numerous racist statements to them and other McDonald's employees for the two preceding months, the general manager (Grable) did not speak with Corliss, as promised, for several days, during which Corliss's racist comments persisted and the plaintiffs tendered their resignations. *Whidbee*, 223 F.3d at 66-67. Grable also failed to report the complaints to higher-ups and dodged an attempt by one plaintiff to meet with him. *Id.* at 67. Finally, although Grable eventually meted out a verbal warning to Corliss, he suggested *inter alia* to the plaintiffs that he could not control Corliss's mouth; that if the plaintiffs had a problem with Corliss maybe they should approach him themselves; and that he (Grable) did not know how to deal with the problem and did not want to deal with it. *Id.* Grable subsequently issued a written warning to Corliss stating that any further offensive conduct would result in disciplinary measures, up to and including termination, but Corliss's comments persisted. *Id.* at 68. Even though Corliss ultimately apologized to one plaintiff and was told again that he could not continue to make offensive comments or would be terminated, the two plaintiffs resigned. *Id.*

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 17th day of September, 2001.

David M. Cohen
United States Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-12

RUTLEDGE v. MACY'S EAST INC, et al	Filed: 01/16/01
Assigned to: JUDGE D. BROCK HORNBY	Jury demand: Plaintiff
Demand: \$0,000	Nature of Suit: 440
Lead Docket: None	Jurisdiction: Federal Question

Cause: 42:1981 Job Discrimination (Race)

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v.

FEDERATED DEPARTMENT STORES, KATE S. DEBEVOISE

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[term 03/14/01] [COR LD NTC]

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